IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT J. CARLSON and JANET B. CARLSON, Appellants/ Cross-Respondents, v. JAMES T. STALEY and SONJA STALEY and their marital community; JOHN DOES 1-20 and JANE DOES 1-20, Defendants, JOHN J. HOLLINRAKE, JR., and KAREN E. HOLLINRAKE and their marital community; RANDAL R. JONES and VICKI JONES and their marital community; JOHN DOES 1-20 and JANE DOES 1-20; and THE INNIS ARDEN CLUB, INC., a Washington for-profit corporation, Respondents/ Cross-Appellants.	)	No. 62222-6-I DIVISION ONE UNPUBLISHED OPINION FILED: March 1, 2010

BECKER, J. — Appellant Robert Carlson lives in Innis Arden, a Seattle community where the homeowners association is authorized to enforce a view preservation covenant. Carlson's view-obstructing trees have been the object of complaints by other Innis Arden homeowners who have petitioned the

association to order Carlson to trim his trees. Carlson seeks a judicial declaration blocking these petitions. He contends that the right to petition the association for enforcement of the restriction on tree height is not available to homeowners whose lots are so far away from his trees that their views are not blocked. The trial court properly dismissed the case with prejudice based on res judicata and collateral estoppel.

BACKGROUND

The background for this litigation is set forth in detail in this court's unpublished decision in Carlson v. Innis Arden Club, Inc., noted at 144 Wn. App. 1037 (2008), review denied, 165 Wn.2d 1041 (2009). We shall refer to that earlier case as Carlson 1. To summarize, homes located in any of the three subdivisions of the Innis Arden community are subject to a restrictive covenant requiring that trees shall be kept to roof height so as not to obstruct views of the sound and Olympic mountains "from a neighboring lot or lots." As quoted in Carlson 1, the covenant provides as follows:

> In order to preserve the views of Puget Sound and the Olympic Mountains from lots in said subdivision, all trees, shrubs, brush and landscaping, whether native or planted, on residential lots in said subdivision shall be kept to a height no higher than the highest point of the roof surface nor higher than the height of the house on each lot, whichever is lower. For this purpose, the height of a house shall be measured from the highest point of the roof surface to the lot grade which shall be the average of the highest and lowest ground elevations at exterior walls of the house. This amendment shall apply only to those trees, shrubs and brush which in any way obstruct the view of the sound and Olympics from a neighboring lot or lots.

Carlson 1, 2008 WL 2082090, at *2. In 1987, in a class action, a trial court upheld the view preservation amendment and ruled that it could be enforced by any Innis Arden lot owner and was cross-enforceable across subdivision boundaries. "The Amendment, as drafted, is reasonable in purpose, i.e., the Amendment is evenhanded, applies to all lot owners and applies to all trees wherever and whenever planted, so long as such trees obstruct views. Overall the Amendment is reasonable in application; however, whether application of the Amendment is reasonable in particular circumstances may require a factual inquiry."[1] This court affirmed. Innis Arden Club, Inc. v. Binns, noted at 50 Wn. App. 1064 (1988).

The trial court in the Binns litigation appointed a special master to adjudicate some 600 individual petitions between Innis Arden homeowners. In 1990, the trial court approved and affirmed all but one of the special master's findings and conclusions. The court rejected the special master's conclusion that the language in the view preservation amendment referring to "neighboring lot or lots" was limited to adjacent or contiguous lots. The order specified that "trees several lots distant may entirely block views. The intent of the covenant is to restore such views. However, 'neighboring' lots must be such as to have an actual-and not *de minimis*-view obstruction." Carlson 1, 2008 WL 2082090, at *3.

In a separate order, the trial court affirmed the earlier ruling and issued a

[1] Clerk's Papers at 655-56, Order Granting Class Action Summary Judgment.

declaratory judgment that the view preservation amendments are enforceable across Innis Arden subdivisions boundaries.[2] These orders were not appealed. The class action terminated in 1992.

Following up on a suggestion by the trial court, the Innis Arden Club in 2005 adopted a bylaw providing for the Club's board to resolve future disputes as a precursor process to judicial review. Under the bylaw, a complaint must be submitted in writing to the Compliance Committee and must provide as complete information as possible concerning an alleged violation. The complaint "must be signed and submitted by a member/shareholder of the Club."[3] In other words, any lot owner may petition for enforcement of the view preservation covenant. There are no other requirements for filing a petition.

If the Board upholds the petition after a hearing, it sets a date for compliance and can impose fines if the member/shareholder (i.e., the homeowner) does not comply. Any party to such a petition may choose from a list of neutral arbitrators to resolve the dispute instead of the board. The bylaw states that the fines and compliance deadline "shall remain in effect unless a court with jurisdiction issues an injunction staying the fines and/or compliance pending review." Carlson 1, 2008 WL 2082090, at *4.

After the adoption of the bylaw establishing the Club's compliance process, several homeowners petitioned the Club to enforce the covenant against view-obstructing trees on Carlson's lot. Homeowner Michael Rasch filed

[2] Clerk's Papers at 665-677, "Order Regarding Cross Enforceability of View Preservation Amendment," December 6, 1990.

[3] Clerk's Papers at 688 (Declaration of John Hollinrake Ex. 6).

a petition in 2005. Carlson filed suit against Rasch and the Club in March 2006 to stop any enforcement activities.[4] This was the beginning of Carlson 1. In May and June 2006, homeowners James Staley, John Hollinrake, and Randal Jones filed petitions with the Club. In August 2007, Carlson filed suit to stop the enforcement activities by Staley, Hollinrake, and Jones, giving rise to the present litigation which we will refer to as Carlson 2.

Carlson 1

In Carlson 1, Carlson sued to quiet title, to obtain a declaratory judgment that the Club's compliance process was invalid, and to enjoin the defendants from taking any action under the Club's compliance process to enforce the view preservation covenant against his property. In connection with the Rasch property in particular, Carlson alleged that it was situated in a different subdivision than his property, a significant distance away; that it was not a "neighboring lot;" that the Carlson trees were not obscuring views from the Rasch property; that Rasch was not the real party in interest with respect to any blockage by Carlson's trees of the view from any lot that Rasch did not own; and that although Rasch had owned his property since 1995, his letter of complaint to Carlson in 2005 was the first time he had complained about Carlson's trees. See generally section 5 of the first amended complaint in Carlson 1. He similarly alleged that the defendant Club had no standing to enforce the covenant with respect to any trees on the Carlson property because the Club does not own a

[4] John Hollinrake was a defendant in this lawsuit for a time, but was dismissed without prejudice.

neighboring lot.[5] Among other things, the complaint asked the court to declare judgment that "none of the Defendants are the real party in interest to assert any purported view preservation rights with respect to properties they do not own," that the view covenant could not be enforced across subdivision boundaries, and that Rasch's assertion of the right to restrict the height of Carlson's trees was barred by the doctrine of laches. See generally sections 9 and 10 of the first amended complaint in Carlson 1. Carlson moved to enjoin the defendants permanently from using the Club's compliance process against his trees. He claimed that the bylaw was unauthorized under the Washington uniform arbitration act, chapter 7.04 RCW, or under the Washington homeowners' associations act, chapter 64.38 RCW.

On January 2, 2007, the trial court granted summary judgment to Rasch and the Club, dismissing with prejudice Carlson's claims that their conduct had created a cloud upon his title. The court ruled that the Club is a homeowners association pursuant to chapter 64.38 RCW with the authority to enact its covenant compliance process, dismissing with prejudice Carlson's claim that the Club's process is invalid. The court also dismissed Carlson's various claims that the view preservation covenant could not be enforced against his property, finding that he was in privity with parties to the prior adjudications in the Binns action and the issues he was raising were or could have been adjudicated in that case. The trial court awarded attorney fees to the Club pursuant to RCW

[5] Complaint in Carlson 1, section 10.6.

64.38.050.[6] These rulings were all affirmed in Carlson 1, decided by this court on May 19, 2008. Carlson filed a petition for review in Carlson 1 on October 21, 2008, which the Supreme Court denied on April 1, 2009.

[6] Eventually, an arbitrator ordered him to cut six noncompliant trees. Carlson resisted and was required to pay sanctions to Rasch. See Carlson v. Innis Arden Club, Inc, noted at 146 Wn. App. 1024 (2008), review denied, 165 Wn.2d 1041 (2009).

Carlson 2

Meanwhile, Carlson filed the present lawsuit in August 2007 to block enforcement of the petitions by Staley, Hollinrake, and Jones. Hollinrake and Jones are parties to this appeal; Staley is not.[7] Initially, Carlson did not name the Club as a defendant and did not overtly seek to have the Club's compliance process declared invalid. He sued only the individual homeowners, seeking to obtain a declaratory judgment and thereby to prevent them from using the Club's compliance process as a means to enforce the restriction on tree height. He alleged that Hollinrake and Jones had filed a petition with the Club asserting that Carlson's trees obscured the views from 30 lots within Innis Arden, all but one of them belonging to other homeowners. The declaratory ruling he sought was to establish: (1) that none of the defendants "are the real party in interest to assert any purported view preservation rights with respect to views of any property they do not own" and (2) that none of the defendants "have any legal or equitable right to restrict the height of trees on the Carlson property."[8]

However, Carlson also asked the court to prevent the defendants "and all those in active concert and participation" with them from submitting their dispute to any form of nonjudicial resolution.[9] Thus, it was clear that one of Carlson's objectives was to bypass the Club's compliance process. Carlson later

[7] Staley filed an answer to Carlson's complaint on July 2, 2008. The trial court's orders granting the Club's and Hollinrake and Jones' motions for summary judgment also dismissed all of Carlson's claims against Staley with prejudice. Staley did not file a response brief to Carlson's appeal and did not participate in oral argument.

[8] Complaint in Carlson 2, section 6.3 and 8.2.

[9] Complaint in Carlson 2, section 7.3 and 8.1.

acknowledged this: "All that the Carlsons seek, by the Complaint in this action, is resolution of the Hollinrake and Jones claims in Superior Court."[10]

Hollinrake and Jones moved to dismiss for failure to join the Club as a necessary or indispensable party. On October 26, 2007, over Carlson's objection, King County Superior Court Judge Dean Lum issued his decision ordering Carlson to join the Club in the action. This order is not contested on appeal. Carlson filed a supplemental complaint on November 28, 2007, joining the Club as a party defendant subject to his original prayer for relief.

The Club held a hearing on the petition on November 14, 2007. The transcript of that hearing indicates that the petitioners were concerned about different trees on Carlson's property, in addition to the trees identified by Rasch.[11]

In June 2008, after this court's decision affirming the trial court in Carlson 1, Hollinrake, Jones, and the Club moved for summary judgment to dismiss Carlson's claims with prejudice. They argued that Carlson was trying to relitigate issues already conclusively established in Carlson 1: the right of any Innis Arden homeowner to use the Club's compliance process to initiate a complaint about a violation of the view preservation covenant and the right of the Club to exercise its statutory rights as a homeowners association to decide such a complaint and issue appropriate enforcement orders.

Carlson denied that he was attempting to relitigate Carlson 1. He

[10] Carlson's response to motions for summary judgment, Clerk's Papers at 882.
[11] Clerk's Papers at 692-728.

asserted that in Carlson 2 he had raised a new issue: whether or not these specific homeowners had "standing" as a "real party in interest" to use the Club's compliance process against him. He argued that they did not because they could not show that his trees were obstructing the views from their lots. Carlson said he was not seeking to declare the Club's compliance process invalid.[12] His stated objective was to prevent the Club from issuing fines until Carlson had a chance to litigate the "standing" issue in court.[13]

On July 24, 2008, Judge Lum granted the summary judgment motions and dismissed all Carlson 2 claims with prejudice, ruling that they were barred by collateral estoppel and res judicata. Carlson appeals.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Our review is de novo. Stalter v. State, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004).

The Supreme Court denied review of this court's decision in Carlson 1, and the mandate issued on July 22, 2009. At this point, it has been preclusively decided that the Club's compliance process is legitimate. It is not unlawful arbitration. Any Innis Arden homeowner in any subdivision has the right to petition the Club to enforce compliance with the view preservation covenant, including compliance by homeowners in the other two subdivisions. When homeowners initiate the process and the Club carries it out by requiring trees to

[12] Carlson's response to motion for summary judgment, Clerk's Papers at 871-72, 884.

[13] Carlson's response to motion for summary judgment, Clerk's Papers at 872.

be trimmed and by imposing sanctions for noncompliance, such conduct does not create a cloud on title.

Carlson does not dispute that those issues were resolved by Carlson 1 and are now precluded. But he maintains that the present lawsuit is different to the extent that it raises specific factual issues concerning the lots belonging to Hollinrake and Jones, who were not defendants in Carlson 1:

> do the Appellees own lots "neighboring" the Carlson lot, do they have standing to assert rights belonging to lots they do not own, are the views from any lots other than the Rasch lot affected by the Carlson trees, are the Appellees' claims barred by laches?[14]

Despite Carlson's effort to present these issues as factual in nature, in reality they are premised on a legal position: that a homeowner's right to petition the Club for an order to trim overgrown trees is conditioned upon "standing"—i.e., making a factual showing that the trees obstruct the view from a lot the petitioner owns. If that position is incorrect—that is, if any Innis Arden homeowner can petition the Club for enforcement of the covenant against particular trees that block views from any lot in Innis Arden—then Carlson's issues are immaterial; if Carlson's trees block views from any lot, it does not matter whether the lots of the petitioning owners are close enough to Carlson to have their own views affected.

What Carlson wished to obtain in this action was a judicial declaration that Hollinrake and Jones lack standing to invoke the Club's process about

[14] Brief of Appellants at 28.

Carlson's trees. Judge Lum refused to provide such a declaration. The order granting summary judgment to Hollinrake and Jones stated: "The Plaintiffs question on various grounds the validity of the covenant compliance procedures . . . and assert that the defendants Staley, Hollinrake and Jones have no right under the Compliance Procedures to request that the Plaintiffs comply with View Preservation Amendment. The issues Plaintiffs raise were or could have been adjudicated in Carlson 1. The doctrines of *res judicata* and collateral estoppel apply to bar such re-litigation."[15]

On appeal, Carlson contends that the court erred by signing an order that dismisses his claims "with prejudice." He interprets the court's order as simply requiring him to participate in the Club's compliance process before seeking declaratory relief in court, and says that he now acknowledges that it is within the trial court's discretion to do so.[16] He contends that reversal is required so that at some future time, after he has submitted to the Club's process, he can renew in court the claims he makes in the present lawsuit.

The trial court, we conclude, did not err by ordering the case dismissed with prejudice. Carlson has failed to identify any claim or issue raised in the present lawsuit that has not already been preclusively decided in previous litigation. This includes his claim that Hollinrake and Jones lack standing to seek enforcement against his trees because their lots are far away and their views are not obstructed.

---

[15] Clerk's Papers at 1108.
[16] Brief of Appellants at 2.

RES JUDICATA

Res judicata refers to the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

For res judicata to apply, a prior judgment must have "a concurrence of identity with a subsequent action" in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. Loveridge, 125 Wn.2d at 763; Rains v. State, 100 Wn.2d 660, 663, 674 P.2d 165 (1983).

The subject matter is the same in Carlson 2 as in Carlson 1: the enforceability of the covenant throughout the three subdivisions, the Club's right to enforce the covenant by means of the compliance process, and the right of any Innis Arden homeowner to invoke the Club's compliance process.

The causes of action are the same. Four criteria are considered in this determination: (1) Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action, (2) whether substantially the same evidence is presented in the two actions, (3) whether the two suits involve infringement of the same right, and (4) whether the two suits arise out of the same transactional nucleus of facts. Rains, 100 Wn.2d at 664.

Each lot owner in Innis Arden enjoys the right to invoke the Club's compliance process and to enforce the view preservation covenant to achieve

the grantor's intent of protecting homeowner views. Relitigating those rights here could impair the rights determined in Carlson 1, as well as those determined in the Binns litigation. The evidence required to relitigate those rights would be the same: the Club's bylaws and the Innis Arden covenants. Both suits allege infringement of the same right: Carlson's property rights as an Innis Arden homeowner. Both suits arise from the same transactional nucleus of facts: Carlson's trees allegedly exceed the height limit, and other homeowners have petitioned the Club to enforce the covenant by ordering Carlson to comply with the tree height restriction.

There is an identity of parties even though the individual homeowner defendants are different people. Identity of parties is a matter of substance, not form, and nominally different parties may be, in legal effect, the same. Rains, 100 Wn.2d at 664. Staley, Hollinrake, and Jones, like Rasch, are homeowners who have filed petitions with the Club to complain about the height of Carlson's trees, and who previously let years go by without registering a complaint. For the purposes of the two suits they are legally equivalent parties and qualitatively the same.

Carlson asserts that he made it clear below that he was not trying to relitigate the issue of cross-enforceability and that "standing" is a different issue in any event. Even if Carlson's claim was not determined in Carlson 1 by express reference in the order of dismissal to terms such as "standing" or "real party in interest," it is still barred by res judicata because it could have and

should have been litigated either then or in the Binns litigation. Res judicata applies not only to claims raised and decided by the court in the prior action, but to every claim "which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Sayward v. Thayer, 9 Wash. 22, 24, 36 P. 966, 38 P. 137 (1894). The Binns trial judge stated as much in ruling that the height restriction was cross-enforceable throughout all three Innis Arden subdivisions:

> The time for bringing this kind of matter to the court was originally. It was a matter which, it seems to me, did relate to the validity of the covenants because their evenhandedness of application through the community was an issue for the court at that time in determining their validity, and in fact it was a central issue. Without a determination of an evenhanded enforcement, the covenants could not have been determined valid.[17]

Carlson does not explain why the ruling on cross-enforceability does not control the standing issue he is now attempting to raise. As noted above, the Binns litigation established that the covenant applies "to all trees wherever and whenever planted, so long as such trees obstruct views." When trees block a view from any one lot, the blockage is of concern to all lot owners in Innis Arden, otherwise there cannot be evenhanded enforcement and the foundational principle of view preservation is undermined. Carlson's claim that standing to file a petition requires more than being a "member/shareholder of the Club" is a matter already decided against him. Carlson may not argue that the right to

[17] Clerk's Papers at 674-75. See also Order of December 6, 1990, Clerk's Papers at 68 ("The time to raise the issue of cross enforceability was in the initial phase, as that issue relates directly to the facial validity of the View Preservation Amendments.").

petition about view blockage exists only for homeowners whose views are blocked.

COLLATERAL ESTOPPEL

Collateral estoppel supplies an additional basis for affirming the trial court's orders of dismissal. Collateral estoppel bars relitigation of issues or facts by a party who has had a fair opportunity to litigate the same issue in a prior proceeding. Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262, 956 P.2d 312 (1998). Identity of parties is not required. To collaterally estop a party from litigating an issue, the party asserting the doctrine must prove four elements:

> (1) The issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

Nielson, 135 Wn.2d at 262-63.

The issue in Carlson 2, stated generally, is whether homeowners in Innis Arden can assert view preservation rights with respect to properties they do not own. Carlson argued below that that issue was not raised or litigated in Carlson 1;[18] he similarly argues on appeal that Carlson 1 "was limited to the Rasch claims that the Carlson trees affected the view from the Rasch property, *and no other property*."[19] The record does not support him on this point. Carlson 1 was initiated by Carlson; it is *his* claims we are concerned with. One of his claims in Carlson 1, specifically alleged in the complaint, was that Rasch was not the real party in interest with respect to Carlson's trees that purportedly blocked views

[18] Carlson's response to motions for summary judgment, Clerk's Papers at 872.
[19] Opening Brief of Appellant at 24.

from any lot Rasch did not own. He asserted that the Club likewise lacked standing to enforce the covenant against Carlson's trees because the Club does not own a neighboring lot. Carlson has not shown that he withdrew these allegations. We therefore conclude they did not survive summary judgment and were dismissed along with his other claims that the view preservation covenant could not be enforced against his property. Also raised and decided in Carlson 1 were several related issues raised by the complaint in Carlson 2: the covenant is enforceable across subdivision boundaries; the Club's compliance process is a valid exercise of the statutory rights of a homeowner association; and laches will not bar a homeowner from petitioning the Club to enforce the covenant. We conclude there is identity of issues.

The judgment in Carlson 1 was a final judgment rendered on the merits. Carlson was a party to Carlson 1. Application of collateral estoppel does not work an injustice because in Carlson 1, as well as in Binns, Carlson or his predecessor had a full and fair opportunity to argue that the right to petition the Club to do something about overgrown trees belongs only to certain homeowners depending on the location of their lots in relation to the trees. Past litigation has established that every homeowner in Innis Arden has the right to petition the Club to do something about anyone else's overgrown trees and that the Club has the right to adjudicate such petitions and order compliance if the trees obstruct views from any lot. The trial court correctly barred Carlson from relitigating that issue.

ATTORNEY FEES

In the trial court, Judge Lum denied the Club's request for attorney fees. The Club cross-appeals this decision.[20]

A trial court's decision to grant or deny attorney fees is reviewed for an abuse of discretion. Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 141, 144 P.3d 1185 (2006).

The Club's motion was grounded on CR 11 and RCW 4.84.185. The Club contends that Carlson violated CR 11 and RCW 4.84.185 by arguing issues and asserting claims he had reason to know were precluded by collateral estoppel and res judicata. The Club argues that Carlson should also have been sanctioned under CR 11 for his behaviour in obtaining a default judgment against Staley and others "in active concert and participation" with him. Carlson obtained the default judgment, later vacated, from the ex parte department on October 26, 2007,[21] when Judge Lum had just taken under advisement the motion to require adding the Club as a necessary party. Judge Lum noted that the issue of attorney fees under CR 11 presented a "very close question," but denied the motion.[22] The trial court's vantage point in monitoring the proceedings below is entitled to deference. Schmerer v. Darcy, 80 Wn. App. 499, 509, 910 P.2d 498 (1996). We conclude that Carlson's suit is not so clearly without merit and his conduct with respect to Staley not so clearly demanding of

[20] Hollinrake and Jones also have filed a cross appeal on this issue, but their motion for an award of attorney fees below is not in the record on appeal.

[21] Clerk's Papers at 98-99.

[22] Clerk's Papers at 1243.

sanction as to compel the conclusion that the trial court abused its discretion in denying fees under CR 11 and RCW 4.84.185.

In a suit concerning a violation of the homeowners' associations act, chapter 64.38 RCW, the court "may" award reasonable attorney fees to the prevailing party "in an appropriate case." RCW 64.38.050. The Club offered this statute as an additional ground in support of their request for attorney fees. The Club argues this was an "appropriate case" because Carlson's suit sought to deny the Club and homeowners powers specifically authorized under the homeowners' associations act. The trial judge in Carlson 1 granted attorney fees to the defendants on that basis. The Club contends the denial of the fee request in this case was incongruous and improper because this case is an attempt to relitigate the same issues and claims.

Again, we do not find that Judge Lum abused his discretion. In this case, Carlson did not voluntarily sue the Club and did not repeat his arguments that the Club's compliance process is invalid. It is true that Carlson's objective in all of his litigation has been to avoid being subjected to a Club order requiring him to trim his trees. Still, his focus in this case has been on the physical locations of the lots of the complaining homeowners rather than on the statutory powers of the Club. For this reason we conclude that the court did not abuse its discretion in deciding that this was not an "appropriate" case for an award of fees under RCW 64.38.050. The cross appeals seeking to reverse the trial court ruling on attorney fees are denied. By the same rationale, we deny the respondents'

requests for an award of attorney fees on appeal under RCW 64.38.050.

Affirmed.

Becker, J.

WE CONCUR:

Grosse, J.